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IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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INTRODUCTION

CBC's Opposition Brief ("Opp.") mischaracterizes the facts and proceedings below, seeking to persuade this Court not to resolve the mature conflict of law presented by the petition. This case does not involve "property rights in historical newsworthy" facts, Opp. i, or "First Amendment interests . . . in using publicly available statistics," *id.* at 8. MLBPA and Advanced Media challenge neither CBC's reporting of baseball news nor its publication of statistics. Petitioners claim that, without consent and in violation of its contractual obligations, CBC incorporates Major League players' identities into predictive games – fantasy baseball products – in which customers pay to speculate on players' future achievements.

Moreover, the petition is *not* the first time petitioners have described the lower courts' varying tests for addressing the interplay of publicity rights and the First Amendment. Petitioners described a number of the tests in the Eighth Circuit, arguing that they should prevail under each; these arguments are wholly consistent with those in the petition. Further, CBC utterly fails to undermine the petition's critical point – that there are conflicting legal standards that result in different outcomes in these cases.

This case is also an excellent vehicle for resolution of the conflict. CBC's use of players' identities indisputably violates state-law publicity rights, App. 5a, cleanly presenting the constitutional questions. And the rationale for the Eighth Circuit's decision – that players already earn a handsome living – would eviscerate state-law publicity rights in virtually all cases involving incorporation of famous persons' identities into commercial products.

Without the players' identities, there would be no fantasy. CBC's games would be no more interesting or commercially viable than games in which participants pay to predict the weather at major cities around the globe. App. 60a.[1] Yet CBC claims a First Amendment right to exploit players' identities in commercial ventures without consent and in violation of its no-use and no-challenge contract obligations. The petition should be granted.

ARGUMENT

I. THE COURTS ARE IN CONFLICT ABOUT THE LEGAL TEST FOR BALANCING STATE-LAW PUBLICITY RIGHTS AGAINST FIRST AMENDMENT INTERESTS.

A. The Conflict Is Broad And Outcome Determinative.

CBC observes that (i) *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), held that state-law publicity rights are enforceable unless the state-law interests are outweighed by First Amendment interests, and (ii) courts addressing publicity-rights claims cite *Zacchini* and apply a balancing test. See Opp. 8. From this, CBC concludes that this case presents no conflict worthy of this Court's attention. This is akin to an argument that there can be no conflict of law under the Fourth Amendment because all courts agree that the constitutional standard is whether a search is reasonable.

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[1] Although CBC attempts to portray this case as concerning ownership of "statistics," *e.g.*, Opp. 5, it does not. The case concerns use of players' identities as playing pieces in predictive games.

It plainly does not follow from the fact that all courts cite *Zacchini* and conduct "balancing" that all courts apply the same standard or the correct standard. Each standard that this Court has articulated for First Amendment claims – from the strict scrutiny applied to restrictions on political speech, to the intermediate scrutiny applied to commercial speech regulations, to the varying formulations applied to libelous speech – imposes a "balancing" test. Yet these tests differ significantly in the presumptive weight given to the interests at stake and the manner in which those interests are assessed. Calling an approach "balancing" is only the first step in the judicial decision-making process.

Zacchini did not, as CBC claims, establish a legal test directly applicable here. *Zacchini* instead broadly outlined an approach that required interest-balancing but, in light of its peculiar facts, explicitly declined to address the "line . . . to be drawn" in other publicity-rights cases. 433 U.S. at 574-75. This Court expressly stated that the case was "more limited than the broad category of lawsuits that may arise under the heading of 'appropriation'" – presenting a "much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform." *Id.* at 573 n.10. As the petition shows (pp. 16-24), courts across the country have used the "balancing" framework to craft a hodge-podge of different tests. CBC correctly notes that every case involves different facts, see Opp. 17. But, the lower courts' distinct approaches result in diverse outcomes in cases that are *factually indistinguishable* because the tests place dispositive weight on different aspects of the relevant state and federal interests. See Pet. 16-24. Had Missouri's predominant-purpose test or the Ninth Circuit's commercial-speech test been

employed, see *id.* at 16, 18, petitioners would have prevailed.[2] Now, the Eighth Circuit has added its own approach to the cacophony. An important conflict exists.

CBC argues that this Court should not resolve the conflict because (i) this is the first time MLBPA has complained of confusion in the lower courts' application of *Zacchini*, (ii) MLBPA identified in the Eighth Circuit only four of the lower courts' varying approaches, and (iii) MLBPA argued below that it should prevail under any test. See Opp. 14-15. The first point is wrong; the rest are irrelevant.

This is *not* the first time MLBPA has identified the differing lower court approaches at issue. MLBPA described many of these approaches in the court of appeals. Moreover, no rule of procedure or practice requires a party to describe *all* nuances of a lower court conflict to petition for certiorari on that issue.

CBC's contention that petitioners are judicially estopped from claiming here that the different lower court tests are outcome-determinative makes no sense and is legally wrong. *Id.* at 16. None of petitioners' arguments in the courts below was "'clearly inconsistent'" with their positions here. See *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Petitioners certainly never claimed that an ad hoc balancing test was interchangeable with other articulated tests; they asserted that even under such a test, they should prevail. See Pet. 22-23. And,

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[2] CBC notes that this Court has twice denied review of the issue presented. Opp. 18. In both cases, the lower court's test would have resulted in a different outcome here. *See* Pet. 16-18, 18 (discussing *Doe* v. *TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (predominant-purpose test); *White* v. *Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (commercial-speech test)).

because the Eighth Circuit rejected petitioners' argument, judicial estoppel has no application. 532 U.S. at 749 ("judicial estoppel . . . 'prevents a party from *prevailing* in one phase of a case . . . and then relying on a contradictory argument to prevail in a later phase'") (emphasis supplied).

CBC also contends that this case is a "poor vehicle" for review of the constitutional issue, but the opposite is true. The violation of state-law publicity rights is clear and no material factual disputes exist, so the constitutional question is cleanly presented. And, the principal rationale of the decision below – that famous persons' publicity rights are outweighed by First Amendment interests when those persons otherwise earn substantial money – would eliminate publicity rights for most famous persons.

In response, CBC incorrectly argues that this vehicle should be passed over because most publicity-rights cases involve "endorsements and advertising," and this case does not. Opp. 18. Numerous cases involve the incorporation of famous persons' identities into commercial products. See, *e.g.*, 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy*, §§ 7:1-7:31 (2d ed. 2005) (dividing uses of personal identity into "use in advertising" and "use on products" and citing numerous cases). And, plainly, the Eighth Circuit's disruption of reliance interests will lead to substantial litigation involving fantasy sports and other products incorporating famous persons' identities. See Brief *Amicus Curiae* of the National Football League Players Association and NFL Players Inc., 13-21 (filed Mar. 27, 2008).

Finally, if this case involved only the appropriation of a likeness to advertise an unrelated product – *e.g.*, using Derek Jeter's likeness to advertise pizza – the player's tort claim would be permitted without

serious First Amendment question. This case instead involves the use of famous persons' identities on products, and the effect of the First Amendment on publicity-rights claims is unsettled in that realm. The factual setting is an additional reason that this case is worthy of review.

Thirty years have passed since *Zacchini* was decided. In that interlude, the internet has emerged and created a new context for commerce, including internet products such as that at issue. Numerous courts have developed approaches for balancing state-law publicity rights with First Amendment interests in a variety of commercial settings wholly unlike that in *Zacchini*. The balancing tests utilized by the lower courts differ substantially and lead to different outcomes. The current incoherence and contradiction in this recurring, important area of federal law urgently need this Court's attention.

B. CBC's Attempted Distinction of *SFAA* Fails.

CBC argues that there is no conflict between this case and *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522 (1987) *("SFAA")*, by reciting *SFAA*'s facts and saying that this case has different facts. CBC fails to address the basic problem that *SFAA* presents for its case. In *SFAA*, the Court held that Congress's decision to restrain private entities' use of the word "Olympic" for commercial purposes was "reasonabl[e]" and easily survived First Amendment scrutiny. *Id.* at 534-35. A State's decision to restrain use of famous persons' identities for commercial purposes is materially indistinguishable.

CBC wrongly claims that this case is different because it involves the more "substantial First

Amendment right in the free flow of information embodied in fantasy baseball." Opp. 12. In *SFAA*, however, this Court recognized that the use of the word "Olympic" in that context (to send a variety of messages about the gay athletes and the gay community generally) had "expressive" elements, but nonetheless declined to allow the organizers of the gay games to appropriate the value of the word "Olympics" that was more properly the "'harvest of those who have sown.'" 483 U.S. at 541.

Here, the only First Amendment interest CBC identifies is the right to sell a game that includes statistical information available without charge from numerous sources. Opp. 12. Thus, the First Amendment interest at stake in *SFAA* was significantly greater than the interest here; yet this Court found that those expressive interests were outweighed by the Olympic Committee's property interest. 483 U.S. at 535-37. The decision below cannot be reconciled with this analysis and outcome.

C. The Outcome Here Conflicts With The "Game Cases."

CBC does not truly dispute that the game cases represent established law that has given rise to significant reliance interests. Instead, it erroneously asserts that the outcome here is "not inconsistent" with those cases. See Opp. 13 (capitalization omitted).

First, CBC asserts that the game cases were decided before *Zacchini*. *Id.* This is beside the point. As noted, *Zacchini* does not state a rule that applies to appropriation cases generally. Moreover, nothing in *Zacchini* casts doubt on the analysis or outcome in the game cases which, post-*Zacchini*, have been cited as authoritative by numerous courts and prominent

practice treatises. See Pet. 26 (citing treatises, including *Restatement (2d) Torts* § 652C, cmt. b (1997) and *Restatement (Third) Unfair Competition*, § 47, cmts. b & c (1995)).

Second, CBC argues that two of the game cases do not weigh publicity rights against First Amendment interests. Opp. 13. Any fair reading of these cases reveals that the opposite is true. In *Palmer* v. *Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967), the defendant argued that its use of golfers' identities and statistics in a board game must be protected because that same information would be protected if published in a newspaper. *Id.* at 460. The court's holding – that use of the information in a newspaper would be protected, while use in a "commercial product" was not, *id.* at 462 – directly rejects an argument based on First Amendment interests.

Palmer's holding and analysis is identical to that *Uhlaender* v. *Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970). There, the court held that even though baseball players' names and statistics are published in the news and are "in the public domain," players had the right to control their use in commercial products. *Id.* at 1282-83. Finally, *Rosemont Enterprises, Inc.* v. *Urban Systems, Inc.*, 340 N.Y.S. 2d 144 (N.Y. Sup. Ct. 1973), and related cases involving the incorporation of Howard Hughes' identity into commercial products, see Pet. 26, conduct the same analysis in First Amendment terms.

The critical point about the game cases is that their uniform, established holdings were viewed as the law, not just by treatise writers and courts, but also by the business community – famous persons and those seeking to license their publicity rights in

commercial settings. See, *e.g.*, NFLPA *Amicus* at 13-18. The overturning of these cases disrupts both substantial reliance interests and established law.

D. The Eighth Circuit's Balancing Misconstrued The Relevant Interests Identified In *Zacchini* and *SFAA*.

CBC also argues that the court below properly balanced the relevant interests. Although the merits are not the foremost consideration on petition, there are clear errors in the Eighth Circuit's balancing that would have been avoided had the court used a different approach.

First, CBC contends that the Eighth Circuit properly discounted the state-law interest because baseball players are handsomely compensated for their work in baseball and for endorsements. See Opp. 10; App. 9a. Most persons able to benefit financially from publicity rights are famous persons with other means of earning substantial incomes. It makes no sense to say that the more valuable a person's identity, the less protection from exploitation it deserves.

The related argument that players are not financially harmed by exploitation of their identities without compensation (Opp. 10; App. 55a) is illogical and wrong. Players have a state-law right to control the commercial exploitation of their identities and to benefit financially from licensing use of their identities. CBC's use of those identities without a license necessarily harms players' economic interests in the amount of the value that players could command on the market.

With respect to players' non-economic interests, CBC (Opp. 10) and the court also erred. The state-law right at issue is intended to protect a person's

inherent right to control the use of his or her identity. See Pet. 24. That interest is infringed when an outsider commercially exploits a famous person's identity without consent.

Finally, contrary to CBC's arguments (Opp. 10), the First Amendment interests here are not substantial. CBC is offering a product – fantasy baseball games – for sale. That product incorporates players' identities to entice consumer interest in what would otherwise be merely another prediction game. Unlike a newspaper's publication of statistics, any transfer of information from CBC to consumers during the course of the game is purely incidental to its operation.

And, it makes no difference that baseball players' names and statistics appear in the newspaper and on television every day. The names of famous persons, including baseball players, are published and broadcast regularly. Yet those names may not be incorporated without the famous persons' consent primarily for commercial purposes into a product – be it a coffee mug, a poster, a board game, or an internet game – without consent. That is what CBC has done and that is what petitioners challenge, not the reporting of baseball facts and statistics.

In sum, enforcement of the players' state-law publicity rights serves the state interests the tort is designed to further, and the First Amendment considerations are weak. There is no suppression of any idea; the statistical information provided in connection with the games is available freely elsewhere. In addition, any state-law limit on expression is narrowly confined to products that appropriate identities primarily for commercial purposes. The balance struck by the Eighth Circuit was wrong.

II. THE COURT'S REFUSAL TO ENFORCE CBC'S NO-USE AND NO-CHALLENGE AGREEMENTS IS WRONG AND PRESENTS A FEDERAL ISSUE WORTHY OF REVIEW.

CBC's Licensing Agreements obligated it not to use or challenge the players' contractually-defined rights when those Agreements expired. The Court of Appeals refused to allow petitioners to enforce CBC's contractual obligations. App. 10a-13a.[3]

In arguing that the Eighth Circuit's decision does not present a second issue worthy of review, CBC first claims that the Circuit's holding applies state law, not constitutional principles. For two reasons, this is incorrect. First, the Eighth Circuit interpreted the First Amendment to make an MLBPA "warranty" in the Licensing Agreement invalid. That conclusion was undoubtedly one of constitutional law.

Second, the petition demonstrated (as the dissent articulated, App. 14a-16a), that the Eighth Circuit effectively made the federal-law determination that First Amendment rights could not be waived through the no-use and no-challenge provisions in the Licensing Agreement. The decision that these provisions could not be enforced necessarily rests on a determination that First Amendment rights cannot be waived in this manner. Accordingly, it conflicts

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[3] CBC notes that it operated two years without a license, Opp. 3. But when CBC began selling through a national publication, *The Sporting News*, MLBPA enforced the players' publicity rights. CTA 1134. In addition, CBC, a multi-million dollar business, states several times that it was weak and thus coerced into signing its Licensing Agreements. *E.g.*, Opp. 4, 6. Nothing is cited in support of the claimed "threats" and poor-mouthing and nothing could be.

with authority in this Court and other courts of appeals. See Pet. 31-33.

Finally, CBC claims that the Eighth Circuit's refusal to enforce the no-use and no-challenge provisions is of no general importance. Opp. 20-21. But, CBC does not address – let alone refute – petitioners' and *amici*'s demonstration that such provisions are routinely included in licensing agreements; that they serve important business and policy interests; and that this decision calls into question their enforceability. Pet. 33-34; NFLPA *Amicus* at 20.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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